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No. 98-138

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JENIFER TROXEL, et vir,

Petitioner,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF OF THE *AMICUS CURIAE* AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

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INTEREST OF *AMICUS CURIAE*

The American Academy of Matrimonial Lawyers ("AAML") respectfully submits this brief as *amicus curiae* pursuant to Rule 37.3 of the Rules of this Court.[1]

The AAML was founded in 1962 to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be preserved. It has more than 1,500 fellows in 48 states.[2] To attain fellowship in the AAML, the attorney must have met requirements as to length of practice, percentage of their practice dedicated to matrimonial law, be recognized by the bench and bar as an expert and ethical practitioner, must have substantial trial experience in matrimonial litigation with consideration given to the ability to achieve settlement without the necessity of trial and pass a written examination. Fellowship in the AAML represents both a recognition of achievements in family law and a commitment to the highest standards of practice in the field.

The AAML has devoted substantial resources to children. The Academy's Special Concerns Of Children Committee established Standards for Attorneys and Guardians-Ad-Litem in Custody or Visitation Proceedings, promulgated a Model Relocation Statute to bring greater

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[1] Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or counsel, have made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37 of the Rules of this Court, the parties consented to the filing of this brief, and copies of the consent have been filed with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the AAML. No inference should be drawn that any judicial member of the AAML has participated in the adoption or endorsement of the position of this brief. The brief was not circulated to any member of the judiciary who was a member of this organization prior to filing.

consistency in the area of a parent wishing to relocate the residence of a child, produced a video entitled "The Voices Of Children Of Divorce," to assist parents in understanding the emotional turmoil that a child goes through in a child custody dispute, and published a manual entitled "Stepping Back from Anger," which includes the Children's Bill of Rights[3] which were approved by the Board of Governors of the AAML.

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[3] **CHILDREN'S BILL OF RIGHTS**

Every kid should know he or she has rights, particularly when their mom and dad are splitting up. Below are some things parents shouldn't forget - and kids shouldn't let them - when the family is in the midst of a break-up.

You have the right to love both your parents. And you have the right to be loved by both of them. That means you shouldn't *feel guilty* about wanting to see your dad or your mom at any time. It's important for you to have both parents in your life, particularly during difficult times such as a divorce.

You do not have to choose one parent over the other. If you have an opinion about what parent you want to live with, let it be known. But nobody can force you to make that choice. If your parents can't work it out, a judge may make the decision for them.

You're entitled to all the feelings you're having. Don't be ***embarrassed by*** what you're feeling. It's scary when your parents break up, and you're allowed to be scared. Or angry. Or sad. Or *whatever.*

You have the right to be in a safe environment. This means that nobody is allowed to put you in danger, *either* physically or emotionally. If one of your parents is hurting you, tell someone - either your other parent or a trusted adult, like a teacher.

You don't belong in the middle of your parents' break-up. Sometimes your parents may get so caught up in their own problems that they forget that you're just a kid, and that you can't handle their adult worries.

Grandparents, aunts, uncles and cousins are still part of your life. Even if you're living with one parent, you can still see relatives on your other parent's side. You'll always be a part of their lives, even if your parents aren't together anymore.

The AAML Special Concerns of Children Committee is currently studying the issue of children's rights to a continued relationship with third parties.[4] No final position has been adopted by the AAML. The AAML Board of Governors at its November 4, 1999, meeting in Chicago, Illinois, adopted the following statement of interest in this pending case:

> The AAML supports the concept that, under proper circumstances, a child should have access to a relationship with a non-parent and a non-parent should have the right to intervene to seek to maintain a relationship with the child.
>
> Any statute permitting such intervention must meet constitutional requirements establishing threshold criteria for intervention and criteria supporting that the intervention is in the best interests of the minor child – the Washington statute does not meet these requirements.

One of the Children's Bill of Rights as promulgated by the AAML and initially created by its Special Concerns of Children Committee is "Grandparents, aunts, uncles and cousins are still part of your life. Even if you're living with one parent, you can still see relatives on your other parent's side. You'll always be a part of their lives, even if your parents aren't together anymore." As the "Stepping Back from Anger" manual suggested: "Imagine you're six, and suddenly the only people you have ever relied on for food, shelter, and love are at each other's throats. In your young mind, you conclude that you are the cause of their anger, and

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You have the right to be a child. Kids shouldn't worry about adult problems. Concentrate on your school work, your friends, activities, etc. Your mom and dad just need your love. They can handle the rest.

[4] Professor Martin Guggenheim, New York University School of Law is the Committee's Reporter for this project.

that you might get lost in the shuffle. Before you know it, you think to yourself, there won't be anybody left to scare off the closet monsters."

The AAML promulgated Bounds Of Advocacy, aspirational standards of conduct, that addresses a Fellows' obligation to children as follows:

> 2.23 In representing a parent, an attorney should consider the welfare of the children.

This case raises critical issues regarding children's rights to continued access with non-parents. These issues are substantially important to the AAML.

STATEMENT OF THE CASE

Amicus Curiae, the American Academy of Matrimonial Lawyers, makes no comment on the statement of the case.

SUMMARY OF ARGUMENT

The American Academy of Matrimonial Lawyers submits this *Amicus* brief to advance the interest of children who would benefit by having the right to maintain their relationship with a non-parent.

The Court must balance the competing constitutional rights of the parents' right to control the details of their children's upbringing with the fact that children are persons within the meaning of the 14th Amendment, with their own liberty and privacy interests. The challenged statute lacks any specificity and does not protect the family's right to avoid being penetrated in the absence of a sufficient justification for a court to order a trial on the issue of a third party's access. A more carefully drawn statute would be constitutional, provided it required a court to bifurcate the inquiry. The statute should require that the court first determine whether the third party had demonstrated a sufficient relationship to

the child, and that the child's right to retain that relationship could be sufficient to override parental discretion.

ARGUMENT

BECAUSE THIRD-PARTY ACCESS STATUTES INTRUDE UPON FUNDAMENTAL CONSTITUTIONAL RIGHTS, THEY MUST BE MORE CAREFULLY DRAWN THAN THE CHALLENGED STATUTE IN THIS CASE

The family has long been protected against untoward intervention by the state. There is no question that legislation authorizing judges to force parents to make their children available to visit non-parents hampers fundamental liberty and privacy interests protected by the Due Process Clause of the Fourteenth Amendment. In particular, parents enjoy the right to control the details of their children's upbringing, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 230-34 (1972), and families enjoy a right to familial privacy, *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), and liberty, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

As this Court has said:

> The absence of dispute [concerning the fundamental nature of the parent-child bond] reflect[s] this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.

Santosky v. Kramer, 455 U.S. 745, 753 (1982). *See also Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

At the same time, children are "persons" within the meaning of the Fourteenth Amendment, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969), with their own liberty and privacy interests, *In re Gault*, 387 U.S. 1 (1967); *Bellotti v. Baird*, 443 U.S. 622 (1979). These interests sometimes will override a parent's interests to make parental decisions affecting them, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

This mixture of rights means that occasionally state action that impedes parental decision making will be tolerated when it furthers a child's independent constitutional rights. Deciding when state action is permissible in these circumstances raises "complex and novel questions." *Smith v. Organization of Foster Families, supra*, 431 U.S. at 847. *See also Wisconsin v. Yoder, supra*, 406 U.S. at 231-32. A properly drawn third-party access statute would have to balance these rights to protect both the parent's and the child's legally protected interests.

When balancing competing constitutional rights, one might be inclined to err on the side of enhancing outcomes that are likely to further a child's rights, particularly when judges are empowered to order visitation only when they determine it would further a child's "best interests."

The American Academy of Matrimonial Lawyers has extensive experience litigating family disputes in state courts throughout the United States. One thing is quite clear from that experience: the costs, both financial and emotional, associated with prosecuting or defending lawsuits involving intimate details of the family are very considerable. They are commonly traumatic events for many parents, having devastating impacts on them and on their ability to parent. Scholars have long recognized that the impact of a lawsuit over visitation on the stability of a child's environment can be extremely detrimental. Joseph Goldstein, Anna Freud and Albert Solnit, co-authors of several influential books on child development theory and its relation to custody law, would

prohibit jurisdiction even to *consider* visitation, unless and until a third party could demonstrate that the case falls within the narrow range of cases where intervention is appropriate. As those authors state it:

> Children . . . react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control. . . . At no stage should intrusion in the family [which the authors define as conducting a hearing] be authorized unless probable cause for the coercive action has been established in accord with limits prospectively and precisely defined by the legislature.

JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 25 (1979).

As one commentator has written:

> It is clear from the psychological literature that a lawsuit over visitation rights, with its accompanying intrusions by psychological experts and lawyers, and its inevitable disruption of the nuclear family, often creates extreme anxiety and dislocation for a child.

Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 124 (1986) (citations omitted).

We believe the Constitution requires a carefully calibrated third-party access statute, wherein courts must first find "standing" before forcing litigants to conduct an evidentiary hearing. At the same time, we believe that children who have formed significant relationships with non-parents (including grandparents, other relatives and even non-relatives) have the right not to suffer an arbitrary veto at the

hands of their parents by cutting off an important relationship based on considerations having nothing to do with the child's interests.

The challenged statute is deficient because it gives standing to "any person" to sue for access to a parent's child. It is also deficient substantively because it fails to provide judges with sufficient boundaries for ascertaining when forcing parents to allow their children to visit non-parents furthers a legitimate state interest. It is inadequate to require only that judges conclude that visitation would be in the child's "best interests." *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), quoting *Smith v. Organization of Foster Families*, 431 U.S. at 862-63 (1977) (Stewart, J. concurring); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion). Scholars have long debated what constitutes the best interests standard. The standard has been challenged as being too open-ended, too indeterminate, and too value-laden. *See, e.g.*, Robert H. Mnookin, *Child-Custody Adjudication: Judicial Function in the face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 257 (Summer 1975). Instead, courts should determine whether or not the parent's decision to disallow access to the third party is an arbitrary choice unrelated to the child's interests. There should be threshold criteria for intervention and criteria supporting that the intervention is in the best interests of the minor child. Thus, for example, where courts find that the child would suffer a substantial loss if contact between the third party and the child were barred and where courts find that the parent's opposition to such access is an arbitrary interference with the child's right to continue contact, courts should be empowered to order such continued contact.

For these reasons, we urge that the Washington statute be declared unconstitutional because it requires parents to defend their parental prerogatives in all cases whenever "any person" chooses to sue them and because it authorizes courts to order third-party access whenever they conclude that access would further the child's "best interests." The challenged

statute lacks any specificity and does not protect the family's rights to avoid being penetrated in the absence of a sufficient justification for a court to order a trial. It is also too broad because it empowers courts to override parental decisions in the absence of a sufficient state interest to do so.

We submit that a more carefully drawn statute would be constitutional provided it required a court to bifurcate the inquiry. The statute should require that the court first determine whether the third party had demonstrated a sufficient relationship to the child, and that the child's right to retain that relationship could be sufficient to override parental discretion. Once a court finds such standing, there would be a legitimate state interest in forcing parents to defend their decision to sever the relationship between the child and the third party. Finally, a court should be allowed to override a parent's decision once it found the decision to be an arbitrary veto of the child's right to maintain the relationship.

For these reasons, we urge this Court to declare the Washington third-party access statute unconstitutionally overbroad but preserve the question for a future case whether a carefully drawn third-party access statute would be constitutional.

CONCLUSION

For the reasons set forth herein, the American Academy of Matrimonial Lawyers respectfully requests that the Court affirm the decision below and find that under proper circumstances, a child should have access to a relationship with a non-parent and a non-parent should have the right to intervene to seek to maintain a relationship with the child and that a statute permitting this intervention must meet constitutional requirements establishing threshold criteria for intervention and criteria supporting that the intervention is in the best interest of the minor child.

Respectfully submitted,

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